

DRAFT

SUMMARY

Creates crime of causing child to witness sexually explicit conduct in first degree. Punishes by maximum of five years' imprisonment, \$125,000 fine, or both. Designates crime as sex crime.

Creates crime of causing child to witness sexually explicit conduct in second degree. Punishes by maximum of one year's imprisonment, \$6,250 fine, or both. Designates crime as sex crime.

Removes certain provisions relating to crime of endangering welfare of minor that cover similar conduct.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to crime; creating new provisions; amending ORS 137.225, 163.345,
3 163.575, 163.580, 181.594 and 475.245; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Sections 2 and 3 of this 2013 Act are added to and made**
6 **a part of ORS 163.305 to 163.467.**

7 **SECTION 2. (1) A person commits the crime of causing a child to**
8 **witness sexually explicit conduct in the first degree if the person**
9 **knowingly engages in an act of sexually explicit conduct as defined in**
10 **ORS 163.665 while knowing that the act will be witnessed by a child**
11 **under 14 years of age.**

12 **(2) Causing a child to witness sexually explicit conduct in the first**
13 **degree is a Class C felony.**

14 **(3) The Oregon Criminal Justice Commission shall classify causing**
15 **a child to witness sexually explicit conduct in the first degree as a**
16 **person felony and crime category 6 on the crime seriousness scale of**

1 **the sentencing guidelines.**

2 **SECTION 3. (1) A person commits the crime of causing a child to**
3 **witness sexually explicit conduct in the second degree if the person**
4 **engages in an act of sexually explicit conduct as defined in ORS 163.665**
5 **while knowing that the act will be witnessed by a child under 18 years**
6 **of age.**

7 **(2) Causing a child to witness sexually explicit conduct in the sec-**
8 **ond degree is a Class A misdemeanor.**

9 **SECTION 4. ORS 163.345 is amended to read:**

10 163.345. (1) In any prosecution under ORS 163.355, 163.365, 163.385, 163.395,
11 163.415, 163.425, 163.427 or 163.435 **or section 2 or 3 of this 2013 Act** in
12 which the victim's lack of consent was due solely to incapacity to consent
13 by reason of being less than a specified age, it is a defense that the actor
14 was less than three years older than the victim at the time of the alleged
15 offense.

16 (2) In any prosecution under ORS 163.408, when the object used to commit
17 the unlawful sexual penetration was the hand or any part thereof of the ac-
18 tor and in which the victim's lack of consent was due solely to incapacity
19 to consent by reason of being less than a specified age, it is a defense that
20 the actor was less than three years older than the victim at the time of the
21 alleged offense.

22 (3) In any prosecution under ORS 163.445 in which the victim's lack of
23 consent was due solely to incapacity to consent by reason of being less than
24 a specified age, it is a defense that the actor was less than three years older
25 than the victim at the time of the alleged offense if the victim was at least
26 15 years of age at the time of the alleged offense.

27 **SECTION 5. ORS 163.575 is amended to read:**

28 163.575. (1) A person commits the crime of endangering the welfare of a
29 minor if the person knowingly:

30 *[(a) Induces, causes or permits an unmarried person under 18 years of age*
31 *to witness an act of sexual conduct or sadomasochistic abuse as defined by*

1 *ORS 167.060; or*

2 [(b)] (a) Permits a person under 18 years of age to enter or remain in a
3 place where unlawful activity involving controlled substances is maintained
4 or conducted; [or]

5 [(c)] (b) Induces, causes or permits a person under 18 years of age to
6 participate in gambling as defined by ORS 167.117; [or]

7 [(d)] (c) Distributes, sells, or causes to be sold, tobacco in any form to a
8 person under 18 years of age; or

9 [(e)] (d) Sells to a person under 18 years of age any device in which to-
10 bacco, marijuana, cocaine or any controlled substance, as defined in ORS
11 475.005, is burned and the principal design and use of which is directly or
12 indirectly to deliver tobacco smoke, marijuana smoke, cocaine smoke or
13 smoke from any controlled substance into the human body including but not
14 limited to:

15 (A) Pipes, water pipes, hookahs, wooden pipes, carburetor pipes, electric
16 pipes, air driven pipes, corncob pipes, meerschaum pipes and ceramic pipes,
17 with or without screens, permanent screens, hashish heads or punctured
18 metal bowls;

19 (B) Carburetion tubes and devices, including carburetion masks;

20 (C) Bonges;

21 (D) Chillums;

22 (E) Ice pipes or chillers;

23 (F) Cigarette rolling papers and rolling machines; and

24 (G) Cocaine free basing kits.

25 (2) Endangering the welfare of a minor by violation of subsection (1)(a),
26 (b)[, (c)] or [(e)] (d) of this section, involving other than a device for smoking
27 tobacco, is a Class A misdemeanor.

28 (3) Endangering the welfare of a minor by violation of subsection [(1)(d)]
29 (1)(c) of this section or by violation of subsection [(1)(e)] (1)(d) of this sec-
30 tion, involving a device for smoking tobacco, is a Class A violation.

31 **SECTION 6.** ORS 181.594 is amended to read:

1 181.594. As used in this section and ORS 181.595, 181.596, 181.597, 181.603,
2 181.609, 181.826, 181.830 and 181.833:

3 (1) "Another United States court" means a federal court, a military court,
4 the tribal court of a federally recognized Indian tribe or a court of:

5 (a) A state other than Oregon;

6 (b) The District of Columbia;

7 (c) The Commonwealth of Puerto Rico;

8 (d) Guam;

9 (e) American Samoa;

10 (f) The Commonwealth of the Northern Mariana Islands; or

11 (g) The United States Virgin Islands.

12 (2) "Attends" means is enrolled on a full-time or part-time basis.

13 (3)(a) "Correctional facility" means any place used for the confinement
14 of persons:

15 (A) Charged with or convicted of a crime or otherwise confined under a
16 court order.

17 (B) Found to be within the jurisdiction of the juvenile court for having
18 committed an act that if committed by an adult would constitute a crime.

19 (b) "Correctional facility" applies to a state hospital or a secure intensive
20 community inpatient facility only as to persons detained therein charged
21 with or convicted of a crime, or detained therein after being found guilty
22 except for insanity under ORS 161.290 to 161.370 or responsible except for
23 insanity under ORS 419C.411.

24 (4) "Institution of higher education" means a public or private educa-
25 tional institution that provides a program of post-secondary education.

26 (5) "Sex crime" means:

27 (a) Rape in any degree;

28 (b) Sodomy in any degree;

29 (c) Unlawful sexual penetration in any degree;

30 (d) Sexual abuse in any degree;

31 (e) Incest with a child victim;

- 1 (f) Using a child in a display of sexually explicit conduct;
- 2 (g) Encouraging child sexual abuse in any degree;
- 3 (h) Transporting child pornography into the state;
- 4 (i) Paying for viewing a child's sexually explicit conduct;
- 5 (j) Compelling prostitution;
- 6 (k) Promoting prostitution;
- 7 (L) Kidnapping in the first degree if the victim was under 18 years of age;
- 8 (m) Contributing to the sexual delinquency of a minor;
- 9 (n) Sexual misconduct if the offender is at least 18 years of age;
- 10 (o) Possession of materials depicting sexually explicit conduct of a child
- 11 in the first degree;
- 12 (p) Kidnapping in the second degree if the victim was under 18 years of
- 13 age, except by a parent or by a person found to be within the jurisdiction
- 14 of the juvenile court;
- 15 (q) Online sexual corruption of a child in any degree if the offender rea-
- 16 sonably believed the child to be more than five years younger than the
- 17 offender;
- 18 (r) Sexual assault of an animal;
- 19 **(s) Causing a child to witness sexually explicit conduct in any de-**
- 20 **gree;**
- 21 [(s)] (t) Any attempt to commit any of the crimes set forth in paragraphs
- 22 (a) to [(r)] (s) of this subsection;
- 23 [(t)] (u) Burglary, when committed with intent to commit any of the of-
- 24 fenses listed in paragraphs (a) to [(r) or (u)] (s) **or** (v) of this subsection; or
- 25 [(u)] (v) Public indecency or private indecency, if the person has a prior
- 26 conviction for a crime listed in this subsection.
- 27 (6) "Sex offender" means a person who:
- 28 (a) Has been convicted of a sex crime;
- 29 (b) Has been found guilty except for insanity of a sex crime;
- 30 (c) Is paroled to this state under ORS 144.610 after being convicted in
- 31 another United States court of a crime that would constitute a sex crime if

1 committed in this state; or

2 (d) Is described in ORS 181.609 (1).

3 (7) "Works" or "carries on a vocation" means full-time or part-time em-
4 ployment for more than 14 days within one calendar year whether financially
5 compensated, volunteered or for the purpose of governmental or educational
6 benefit.

7 **SECTION 7.** ORS 137.225, as amended by section 4, chapter 70, Oregon
8 Laws 2012, is amended to read:

9 137.225. (1)(a) At any time after the lapse of three years from the date of
10 pronouncement of judgment, any defendant who has fully complied with and
11 performed the sentence of the court and whose conviction is described in
12 subsection (5) of this section by motion may apply to the court where the
13 conviction was entered for entry of an order setting aside the conviction; or

14 (b) At any time after the lapse of one year from the date of any arrest,
15 if no accusatory instrument was filed, or at any time after an acquittal or
16 a dismissal of the charge, the arrested person may apply to the court that
17 would have jurisdiction over the crime for which the person was arrested,
18 for entry of an order setting aside the record of the arrest. For the purpose
19 of computing the one-year period, time during which the arrested person has
20 secreted himself or herself within or without this state is not included.

21 (2)(a) A copy of the motion and a full set of the defendant's fingerprints
22 shall be served upon the office of the prosecuting attorney who prosecuted
23 the crime or violation, or who had authority to prosecute the charge if there
24 was no accusatory instrument filed, and opportunity shall be given to contest
25 the motion. The fingerprint card with the notation "motion for setting aside
26 conviction," or "motion for setting aside arrest record" as the case may be,
27 shall be forwarded to the Department of State Police. Information resulting
28 from the fingerprint search along with the fingerprint card shall be returned
29 to the prosecuting attorney.

30 (b) When a prosecuting attorney is served with a copy of a motion to set
31 aside a conviction under this section, the prosecuting attorney shall provide

1 a copy of the motion and notice of the hearing date to the victim, if any, of
2 the crime by mailing a copy of the motion and notice to the victim's last-
3 known address.

4 (c) When a person makes a motion under subsection (1)(a) of this section,
5 the person must pay a fee of \$80 to the Department of State Police. The
6 person shall attach a certified check payable to the Department of State
7 Police in the amount of \$80 to the fingerprint card that is served upon the
8 prosecuting attorney. The office of the prosecuting attorney shall forward
9 the check with the fingerprint card to the Department of State Police.

10 (d) In addition to the fee established under paragraph (c) of this sub-
11 section, when a person makes a motion under subsection (1)(a) of this section
12 the person must pay the filing fee established under ORS 21.135.

13 (3) Upon hearing the motion, the court may require the filing of such af-
14 fidavits and may require the taking of such proofs as the court deems proper.
15 The court shall allow the victim to make a statement at the hearing. Except
16 as otherwise provided in subsection (14) of this section, if the court deter-
17 mines that the circumstances and behavior of the applicant from the date
18 of conviction, or from the date of arrest as the case may be, to the date of
19 the hearing on the motion warrant setting aside the conviction, or the arrest
20 record as the case may be, the court shall enter an appropriate order that
21 shall state the original arrest charge and the conviction charge, if any and
22 if different from the original, date of charge, submitting agency and disposi-
23 tion. The order shall further state that positive identification has been es-
24 tablished by the Department of State Police and further identified as to
25 Department of State Police number or submitting agency number. Upon the
26 entry of the order, the applicant for purposes of the law shall be deemed not
27 to have been previously convicted, or arrested as the case may be, and the
28 court shall issue an order sealing the record of conviction and other official
29 records in the case, including the records of arrest whether or not the arrest
30 resulted in a further criminal proceeding.

31 (4) The clerk of the court shall forward a certified copy of the order to

1 such agencies as directed by the court. A certified copy must be sent to the
2 Department of Corrections when the person has been in the custody of the
3 Department of Corrections. Upon entry of the order, the conviction, arrest
4 or other proceeding shall be deemed not to have occurred, and the applicant
5 may answer accordingly any questions relating to its occurrence.

6 (5) The provisions of subsection (1)(a) of this section apply to a conviction
7 of:

8 (a) A Class B felony, except for a violation of ORS 166.429 or any crime
9 classified as a person felony as that term is defined in the rules of the
10 Oregon Criminal Justice Commission.

11 (b) A Class C felony, except for criminal mistreatment in the first degree
12 under ORS 163.205 when it would constitute child abuse as defined in ORS
13 419B.005 or any sex crime.

14 (c) The crime of possession of the narcotic drug marijuana when that
15 crime was punishable as a felony only.

16 (d) A crime punishable as either a felony or a misdemeanor, in the dis-
17 cretion of the court, except for:

18 (A) Any sex crime; or

19 [(B) *The following crimes when they would constitute child abuse as de-*
20 *fined in ORS 419B.005:*]

21 [(i)] **(B) Criminal mistreatment in the first degree under ORS 163.205**
22 **when it would constitute child abuse as defined in ORS 419B.005.;**
23 *and]*

24 [(ii) *Endangering the welfare of a minor under ORS 163.575 (1)(a).*]

25 (e) A misdemeanor, including a violation of a municipal ordinance, for
26 which a jail sentence may be imposed, except for [*endangering the welfare*
27 *of a minor under ORS 163.575 (1)(a) when it would constitute child abuse as*
28 *defined in ORS 419B.005 or]* any sex crime.

29 (f) A violation, whether under state law or local ordinance.

30 (g) An offense committed before January 1, 1972, that if committed after
31 that date would be:

1 (A) A Class C felony, except for any sex crime or for [*the following crimes*
2 *when they would constitute child abuse as defined in ORS 419B.005:*]

3 [(i)] criminal mistreatment in the first degree under ORS 163.205[; and]
4 **when it would constitute child abuse as defined in ORS 419B.005.**

5 [(ii) *Endangering the welfare of a minor under ORS 163.575 (1)(a).*]

6 (B) A crime punishable as either a felony or a misdemeanor, in the dis-
7 cretion of the court, except for any sex crime or for [*the following crimes*
8 *when they would constitute child abuse as defined in ORS 419B.005:*]

9 [(i)] criminal mistreatment in the first degree under ORS 163.205[; and]
10 **when it would constitute child abuse as defined in ORS 419B.005.**

11 [(ii) *Endangering the welfare of a minor under ORS 163.575 (1)(a).*]

12 (C) A misdemeanor, except for [*endangering the welfare of a minor under*
13 *ORS 163.575 (1)(a) when it would constitute child abuse as defined in ORS*
14 *419B.005 or*] any sex crime.

15 (D) A violation.

16 (6) Notwithstanding subsection (5) of this section, the provisions of sub-
17 section (1) of this section do not apply to:

18 (a) A conviction for a state or municipal traffic offense.

19 (b) A person convicted, within the 10-year period immediately preceding
20 the filing of the motion pursuant to subsection (1) of this section, of any
21 other offense, excluding motor vehicle violations, whether or not the other
22 conviction is for conduct associated with the same criminal episode that
23 caused the arrest or conviction that is sought to be set aside. Notwith-
24 standing subsection (1) of this section, a conviction that has been set aside
25 under this section shall be considered for the purpose of determining whether
26 this paragraph is applicable.

27 (c) A person who at the time the motion authorized by subsection (1) of
28 this section is pending before the court is under charge of commission of any
29 crime.

30 (7) Notwithstanding subsection (5) of this section, the provisions of sub-
31 section (1)(a) of this section do not apply to:

1 (a) Criminal mistreatment in the second degree under ORS 163.200 if the
2 victim at the time of the crime was 65 years of age or older; and

3 (b) Criminal mistreatment in the first degree under ORS 163.205 if the
4 victim at the time of the crime was 65 years of age or older.

5 (8) Notwithstanding subsection (5) of this section, the provisions of sub-
6 section (1)(a) of this section do not apply to criminally negligent homicide
7 under ORS 163.145, when that offense was punishable as a Class C felony.

8 (9) Notwithstanding subsection (5) of this section, the provisions of sub-
9 section (1)(a) of this section apply to a conviction for a Class B felony de-
10 scribed in subsection (5)(a) of this section only if:

11 (a) Twenty years or more have elapsed from the date of the conviction
12 sought to be set aside or of the release of the person from imprisonment for
13 the conviction sought to be set aside, whichever is later; and

14 (b) The person has not been convicted of or arrested for any other offense,
15 excluding motor vehicle violations, after the date the person was convicted
16 of the offense sought to be set aside. Notwithstanding subsection (1) of this
17 section, a conviction or arrest that has been set aside under this section
18 shall be considered for the purpose of determining whether this paragraph
19 is applicable.

20 (10) The provisions of subsection (1)(b) of this section do not apply to:

21 (a) A person arrested within the three-year period immediately preceding
22 the filing of the motion for any offense, excluding motor vehicle violations,
23 and excluding arrests for conduct associated with the same criminal episode
24 that caused the arrest that is sought to be set aside. An arrest that has been
25 set aside under this section may not be considered for the purpose of deter-
26 mining whether this paragraph is applicable.

27 (b) An arrest for driving while under the influence of intoxicants if the
28 charge is dismissed as a result of the person's successful completion of a
29 diversion agreement described in ORS 813.200.

30 (11) The provisions of subsection (1) of this section apply to convictions
31 and arrests that occurred before, as well as those that occurred after, Sep-

1 tember 9, 1971. There is no time limit for making an application.

2 (12) For purposes of any civil action in which truth is an element of a
3 claim for relief or affirmative defense, the provisions of subsection (3) of this
4 section providing that the conviction, arrest or other proceeding be deemed
5 not to have occurred do not apply and a party may apply to the court for
6 an order requiring disclosure of the official records in the case as may be
7 necessary in the interest of justice.

8 (13) Upon motion of any prosecutor or defendant in a case involving re-
9 cords sealed under this section, supported by affidavit showing good cause,
10 the court with jurisdiction may order the reopening and disclosure of any
11 records sealed under this section for the limited purpose of assisting the in-
12 vestigation of the movant. However, such an order has no other effect on the
13 orders setting aside the conviction or the arrest record.

14 (14) Unless the court makes written findings by clear and convincing ev-
15 idence that granting the motion would not be in the best interests of justice,
16 the court shall grant the motion and enter an order as provided in subsection
17 (3) of this section if the defendant has been convicted of one of the following
18 crimes and is otherwise eligible for relief under this section:

- 19 (a) Abandonment of a child, ORS 163.535.
- 20 (b) Attempted assault in the second degree, ORS 163.175.
- 21 (c) Assault in the third degree, ORS 163.165.
- 22 (d) Coercion, ORS 163.275.
- 23 (e) Criminal mistreatment in the first degree, ORS 163.205.
- 24 (f) Attempted escape in the first degree, ORS 162.165.
- 25 (g) Incest, ORS 163.525, if the victim was at least 18 years of age.
- 26 (h) Intimidation in the first degree, ORS 166.165.
- 27 (i) Attempted kidnapping in the second degree, ORS 163.225.
- 28 (j) Attempted robbery in the second degree, ORS 164.405.
- 29 (k) Robbery in the third degree, ORS 164.395.
- 30 (L) Supplying contraband, ORS 162.185.
- 31 (m) Unlawful use of a weapon, ORS 166.220.

1 (15) As used in this section, “sex crime” has the meaning given that term
2 in ORS 181.594.

3 **SECTION 8.** ORS 163.580 is amended to read:

4 163.580. (1) Any person who sells any of the smoking devices listed in ORS
5 163.575 [(1)(e)] **(1)(d)** shall display a sign clearly stating that the sale of such
6 devices to persons under 18 years of age is prohibited by law.

7 (2) Any person who violates this section commits a Class B violation.

8 **SECTION 9.** ORS 475.245 is amended to read:

9 475.245. Whenever any person pleads guilty to or is found guilty of pos-
10 session of a controlled substance under ORS 475.752 (3), 475.814, 475.824,
11 475.834, 475.854, 475.864, 475.874, 475.884 or 475.894, of endangering the wel-
12 fare of a minor under ORS 163.575 [(1)(b)] **(1)(a)**, of frequenting a place where
13 controlled substances are used under ORS 167.222 or of a property offense
14 that is motivated by a dependence on a controlled substance, the court,
15 without entering a judgment of guilt and with the consent of the district
16 attorney and the accused, may defer further proceedings and place the person
17 on probation. Upon violation of a term or condition of probation, the court
18 may enter an adjudication of guilt and proceed as otherwise provided. Upon
19 fulfillment of the terms and conditions, the court shall discharge the person
20 and dismiss the proceedings against the person. Discharge and dismissal
21 under this section shall be without adjudication of guilt and is not a con-
22 viction for purposes of this section or for purposes of disqualifications or
23 disabilities imposed by law upon conviction of a crime. There may be only
24 one discharge and dismissal under this section with respect to any person.

25 **SECTION 10. This 2013 Act being necessary for the immediate**
26 **preservation of the public peace, health and safety, an emergency is**
27 **declared to exist, and this 2013 Act takes effect on its passage.**

28